Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1630

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
B. B. KYLER, CO. III;
R. E. STOTELMYER, Major;
B. K. SMITH, Counselor III;
K. R. HILEMAN, Farm Manager;
D. R. ERHARD, Deputy Supt.
for Treatment;
T. W. HENRY, Director of Treatment;
W. W. MATEER, C. I., Manager

Petitioners

vs.

AARON HELMS,

Respondent

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

John M. Humphrey, Esquire
Attorney for Respondent
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1. In his Complaint the Plaintiff sought broad relief including a declaration that the Defendants' policies with regard to the use of a hearsay account of uncorroborated information from a single unidentified informant be declared unconstitutional (Pet. App. 17a). The Court of Appeals specifically declared that the Defendants' practices were unconstitutional. Helms vs. Hewitt, 655 F.2d 487, 503 (3rd Cir. 1981) (Helms I) (Pet. App. 18a - 19a). Further, not only were the policies declared unconstitutional, but the Court of Appeals set forth specific procedures that "must be followed to provide minimum due process." Id. at 502. These procedures serve as a standard of conduct to guide prison officials in the future. (Pet. App. 19a). While the Petitioners appealed parts of the Court's holding in Helms I, the Petitioners took no appeal on that

part of the opinion which declared their practices with regard to unidentified informants to be unconstitutional.

Petitioners then, while the case was still pending final review on appeal, promulgated regulations specifically addressing the use of hearsay reports based on information from confidential informants in prison disciplinary proceedings. (Pet. App. 21a). The Third Circuit found that in light of the above facts, Plaintiff had obtained relief of the same general type as requested during the course of the litigation and further remanded the case to the district court for hearing on whether Plaintiff's suit was a catalyst for the promulgation of the Petitioner's regulations.

2. Petitioner's reliance on Kentucky vs. Graham, _____ U. S. _____, 105 S. Ct. 3099 (1985), is misplaced. Graham involved an action seeking only

money damages where attorney's fees were being sought from the State of Kentucky who was not and could not be a party to the case. The court held that the state could not be liable for attorney's fees because it was not and could not be a party to the action. The court addressed who could be prevailed against, not "the nature or degree of success necessary to make a plaintiff a prevailing party." Id. at 3105 n. 9.

3. Petitioners try to create a false conflict between the circuits with respect to the issue of who is a prevailing party. In this regard, Petitioners cite Dover vs. Rose, 709 F.2d 436 (6th Cir. 1983) and Othen vs. Ann Arbor School Bd., 699 F.2d 309 (6th Cir. 1983) as being in conflict with the opinion of the Third Circuit.

In Othen, a father brought a sex discrimination suit alleging that his

daughter was being denied an opportunity to compete on the school golf team because of her sex. The father ultimately withdrew his complaint. There was no question of declaratory relief in Othen and the father had shown no entitlement to relief or shown that his lawsuit was a catalyst which caused the policy of the defendants to change. The reason for denying the fees in Othen was simply that nothing had occurred as a result of plaintiff's lawsuit. The Othen court did specifically note that a plaintiff could be a prevailing party if his lawsuit did act as a catalyst which caused the defendant to change its past practices. In Dover vs. Rose, supra., there was again no request for any type of declaratory relief. The court specifically noted this fact three separate times in their opinion. Dover vs. Rose, supra. at 437, 439. The Dover court, however, also

specifically noted that a party could prevail if his suit acted as a catalyst in causing the defendants to alter their past practices. The plaintiff, however, did not even allege that his suit had acted as a catalyst. Id. at 439. Finally, in a case recently affirmed by this Court, the Fourth Circuit set forth language from the House Report which indicates why relief should be granted in cases such as this.

> Furthermore, while damages are theoretically available under the statutes covered by (Section 1988), it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, Civil and Constitutional rights are to be adequately protected.

H. R. Rep. No. 1558, 94 Cong., 2nd Sess. 9 (1976); as cited in Allen vs. Burke, 690

F.2d 376 at 379 (4th Cir. 1982), aff'd. sub nom Pulliam vs. Allen, _____ U. S. _____, 104 S. Ct. (1970).

The opinions cited by the Petitioner, therefore, do not address the prevailing party issue which was before the Third Circuit except with regard to the catalyst issue and on the catalyst issue they strongly support the holding of the Third Circuit.

4. While Petitioners focus upon mootness, Respondent seriously questions this emphasis. See Lane vs. Reid, 559 F. Supp. 1047, 1052 (S.D. N.Y. 1983). First, contrary to the Petitioners' assertion that the regulations were promulgated long after the litigation, the regulations were in fact promulgated while this case was on appeal to the Third Circuit. Second, while Petitioner cites cases dealing with improperly granted injunctive relief, Petitioner cites no case where declaratory

relief was involved. In fact, the case of Tucker vs. Summers, C.A. No. 85-3355 (5th Cir., March 10, 1986) denied relief based upon the preliminary injunction because they court had no subject matter jurisdiction, but the court also went on to analyze whether the lawsuit had acted as a catalyst in motivating the defendants to end their unconstitutional behaviour. Based upon the testimony of defendants, the court found that the lawsuit had not acted as a catalyst. Finally, under Pennsylvania law "a prisoner on parole is still in the legal custody of the warden of the institution from which he was paroled and he is under the control of the warden until the expiration of the term of his sentence." Commonwealth vs. Russell, 403 Pa. 320, 169 A.2d 884 at 885 (1961); Hendrickson vs. Pennsylvania State Board of Parole, 409 Pa. 204, 185 A.2d 581, 584 (1962); cited with approval in

Johnson vs. Comp. Pa. Bd. of Probation and Parole, 482 A.2d 235 (Pa. 1984). [1]

5. Even if mootness were considered an issue, this case would not be well suited for a grant of review of the prevailing party issues involved. It has been almost 7 years since this case was initially begun and, even under a liberal interpretation of the Petitioner's case law, this case would still have to be remanded to the district court to determine whether Plaintiff's lawsuit was a catalyst in causing the Defendants to change their unconstitutional practices. Further, as suggested in the Third Circuit's opinion, given the fact that the

[1] It is also worth noting that the Respondent, Aaron Helms, is presently incarcerated, under a new sentence, in the Pennsylvania Prison System. (Affidavit attached)

regulations were promulgated during the pendency of the appeal, (Pet. App. 10a) there is strong indication that the Respondent's lawsuit in fact caused the regulations to be promulgated. (Pet. App. 10(a), 24(a)).

Respondent, therefore, respectfully requests this Court to deny the Petition for Writ of Certiorari.

RIEDERS, TRAVIS, MUSSINA,
HUMPHREY & HARRIS

BY: _____

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161 West Third Street
P.O. Box 215
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(M8640528)

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Petitioners

vs.

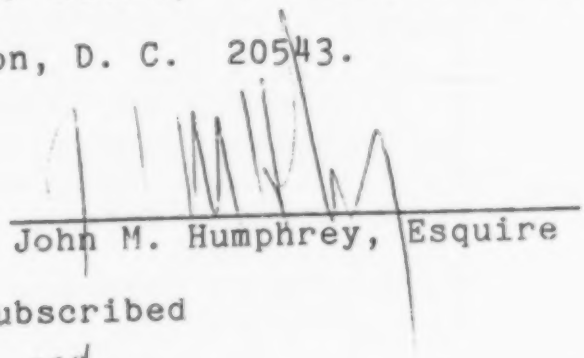
AARON HELMS,

Respondent

AFFIDAVIT OF MAILING

I, JOHN M. HUMPHREY, ESQUIRE, being duly sworn according to law, depose and state that on this 5th day of May, 1986, I mailed by first-class mail the foregoing Respondent's Memorandum in

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit to United States Supreme Court, 1 First Street, N.E., Washington, D. C. 20543.



John M. Humphrey, Esquire

Sworn to and subscribed
before me this 2nd day
of May , 1986

Kimberly A. Lepley
Notary Public

KIMBERLY A. LEPLEY, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires April 6, 1987

No. 85-
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Supt.;
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AFFIDAVIT OF
RICHARD G. FISHMAN

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF CENTRE

I, Richard G. Fishman, Esquire, being duly sworn according to law depose and state that on this 30th day of April, 1986, I spoke telephonically with Robert Best, Records Supervisor for the Pennsylvania Department of Corrections,

who advised me that the Respondent in the above-captioned matter, Aaron Helms, was presently incarcerated at the State Correctional Institution, Graterford, Pennsylvania, and that he had been received into that institution on April 12, 1985.

Richard G. Fishman, Esq.

Sworn to and subscribed
before me this 30th day
of April, 1986.

Barbara Johnson
Notary Public

BARBARA JOHNSON, Notary Public
State College, Centre County, Pa.
My Commission Expires September 25, 1989